

Taking the Next Step? Achieving another Bill of Rights

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Taking the Next Step? Achieving another Bill of Rights

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Abstract

The aim of this article is to explore the recent Bill of Rights debate in the UK. This is deliberately located in the UK's complex 'national question' because of the obsessive focus on achieving a proper grounding for human rights. A new form of national human rights protectionism appears to be emerging and merits careful consideration. The article suggests that it is better to acknowledge and accept the existence of a plurality of nationalisms in the UK in these discussions and understand how an essentially 'British nationalist' discourse sounds and works in that overall context. The concern is that the Bill of Rights debate is becoming an inadequate surrogate for the more challenging constitutional conversations that are required, and human rights discourse thus invested with expectations of national renewal that it can never meet and does not have the internal resources to resolve. If the process does go forward it may be better to prepare the ground for a deeper and wider constitutional dialogue across these islands than stumble clumsily and divisively into this territory simply via 'another' UK Bill of Rights.

Introduction

The Human Rights Act 1998 (HRA) has not had an easy childhood.¹ Several tall tales were told before its eventual arrival and it has struggled to establish itself positively in the public imagination. The new legislation has been subjected to sustained and agonised citizenship testing, and its national origins questioned. Increasingly desperate attempts to prove its national status have not been persuasive to sceptics and even some supporters,² and the treatment of the HRA oddly mirrors the attitude to those who rely on its protective embrace most. Defending the HRA therefore frequently feels like a plea also for all those who want us to acknowledge their *personhood* first.

Early political hostility to the HRA has not abated and calls for its repeal are still made.³ Yet it has found a ready home within the legal system, and early fears and

* Thanks to Jonathan Cooper and the two anonymous reviewers for their comments on a draft of this article.

¹ See Merris Amos, 'Problems with the Human Rights Act 1998 and How to Remedy Them: Is a Bill of Rights the Answer?' (2009) 72 *Modern Law Review* 883. The literature on the HRA is now vast, see, e.g. Richard Clayton and Hugh Tomlinson, *The Law of Human Rights* (Oxford: Oxford University Press, 2nd ed, 2009); Ian Leigh and Roger Masterman, *Making Rights Real: The Human Rights Act in its First Decade* (Oxford: Hart Publishing, 2008); Conor Gearty, *Principles of Human Rights Adjudication* (Oxford: Oxford University Press, 2004). For a sceptical perspective see K.D. Ewing, 'The Futility of the Human Rights Act' [2004] *Public Law* 829; K.D. Ewing and Joo-Cheong Tham, 'The Continuing Futility of the Human Rights Act' [2008] *Public Law* 668.

² See, for example, Jack Straw, 'Let's bring human rights home' *Guardian*, October 26, 2010: 'The Human Rights Act, despite its sometimes rocky first years, is now an embedded part of our national law. The next challenge is to ensure that it becomes an embedded part of *our national identity*.' (emphasis added). Cf. Geoffrey Robertson, 'Why We Need a British Bill of Rights' *Standpoint* January/February 2010.

³ Amos lists some of the problems, including a lack of knowledge of, and respect for, the Act, the range of rights protected, as well as its overall design, interpretation and application. Amos, 'Problems with the Human Rights Act 1998 and How to Remedy Them: Is a Bill of Rights the Answer?' (2009) 72 *Modern Law Review* 883.

expectations about its impact were not realised.⁴ The HRA has been carefully and steadily absorbed into the legal system of the United Kingdom (UK) and a strong case can be made for its retention and the security of its place in the constitutional order.⁵ The largely political concerns voiced appear, however, to have been influential, in that the discussion evolved into moving away from, or building on what currently exists – in the form of, for example, working towards a new Bill of Rights and Responsibilities.⁶ How feasible some of the proposals are - or how seriously they are advanced - will remain to be seen, and it may be that any genuine appetite for a comprehensive new British/UK Bill of Rights that replaces the HRA has weakened.

The purpose of this article is to examine the question of what it might mean to achieve a Bill of Rights within the UK, and raise questions for the future development of this debate. The intention is therefore to explore the discussion as it has progressed over the last decade, from giving further effect to selected aspects of the European Convention on Human Rights (ECHR) to the re-emergence of the idea of a constitutional Bill of Rights for the UK. Increasingly, the concept of responsibilities also features prominently in the discussions. There are many intriguing dimensions to this, but two will be drawn out in this article. First, how are notions of ownership deployed and how do they interact with rights-talk? The UK is a 'union state' or plurinational state⁷ or quasi-federal state,⁸ within which a range of nationalisms (state and sub-state) currently co-exist. This should (but sometimes does not) complicate the use of rights as a mechanism for strategies which are explicitly aimed at national integration. There is a tendency to connect such talk only to sub-state 'nationalist parties' within the UK's constituent parts (nationalism being akin to a virus that everyone else has but not the 'British'). Yet the political language of rights used by two of the main parties in Britain (Conservative and Labour) has also been infused with 'nationalism' (of the

⁴ See David Erdos, 'Smoke but No Fire? The Politics of a "British" Bill of Rights' (2010) 81 *The Political Quarterly* 188, p. 188 who compares the HRA to a 'powerful engine, which is gradually pulling the British state away from a set-up founded on parliamentary sovereignty and towards one based on rights constitutionalism'.

⁵ See, e.g. Alan Boyle, Chris Himsworth, Andrea Loux, Hector McQueen, *Human Rights and Scots Law* (Oxford: Hart Publishing, 2002); Brice Dickson, 'The Impact of the Human Rights Act in Northern Ireland' in John Morison, Kieran McEvoy, Gordon Anthony (eds), *Judges, Transition, and Human Rights* (Oxford: Oxford University Press, 2007) pp. 201-222; Department for Constitutional Affairs, *Review of the Impact of the Human Rights Act* (London: DCA, July 2006). This process of integration has, however, not prevented critical views emerging about how the Strasbourg court interprets and applies Convention rights, and this may become a more prominent theme see, e.g. Lord Hoffmann, *The Universality of Human Rights*, Judicial Studies Board Annual Lecture, March 2009. Contrast this with Lady Justice Arden, *Is the Convention Ours?* Seminar to mark the official opening of the judicial year, January 29, 2010. For further judicial views see *R(Ullah) v Special Adjudicator* [2004] 2 AC 323; *R v Horncastle and others* [2009] UKSC 14; and *Secretary of State for the Home Department v AF* [2009] UKHL 28. See 'Learco Chindamo: Britain must make its own human rights laws' *The Telegraph*, November 25, 2010 and Geoffrey Robertson, 'Why We Need a British Bill of Rights' *Standpoint* January/February 2010. Cf. 'UK bill of rights plan a "bad idea", warns head of European court' *Guardian*, June 28, 2010.

⁶ 'New' is used to capture the fact that there is a persuasive school of thought that believes the HRA is a Bill of Rights for the UK, see, e.g. Francesca Klug 'Bill of Rights: what's in a name?' *Guardian*, January 19, 2010: 'Virtually all informed legal and political commentators at the time, and since, have recognised that the HRA is a bill of rights by any other name...'

⁷ See Neil Walker, 'Beyond the Unitary Conception of the UK Constitution' [2000] *Public Law* 384 and Neil MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999). See also the work of Stephen Tierney on plurinational states and the nuances of modern debates around nationalism, Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford: Oxford University Press, 2004); Stephen Tierney, 'We the Peoples': Constituent Power and Constitutionalism in Plurinational States' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2007) pp. 229-245.

⁸ Vernon Bogdanor, *The New British Constitution* (Oxford: Hart Publishing, 2009).

state-based variety) for at least the last decade. The current phase of the debate continues to dwell obsessively on the question of the perceived national ownership of rights.

The first part of this article examines the idea of 'rights brought home' and how notions of identity have been employed. For example, what role is 'Britishness' playing? How helpful is this? If this is about forms of 'constitutional patriotism',⁹ is it time to extend the discussion to fuller consideration of a written constitution for the UK?¹⁰ The second part of this article examines the development of the current Bill of Rights debate. How likely is it that the 'next step' might be taken? Has the end of the road been reached for domestic human rights protection with the HRA, or are we entering a process that will lead to a new UK/British Bill of Rights and Responsibilities (and/or Duties and/or Freedoms)?

Rights Brought Home? Making the National Case

One of the main arguments used to justify human rights legislation by the new Labour Government in 1997 was that it would 'bring rights home', and this was part of its wider agenda of UK-wide constitutional reform.¹¹ The HRA therefore combined a desire to achieve constitutional reform for the whole of the UK grounded in human rights (thus the view that the Act is a Bill of Rights for the UK) and give further effect domestically to Convention rights (promoting the view that the Act is merely a statute of 'incorporation' like any other).¹²

The role of the UK in helping to draft the Convention was consistently mentioned in the debate, as evidence of its national heritage, and this point is still underlined in discussions.¹³ With the impending (and now real) change in government at Westminster, this project went even further to include highlighting the specific role of the Conservative Party.¹⁴ Attempts to demonstrate that the Convention rights are not alien to British constitutional traditions have a long history. The issues were posed starkly in the White Paper:

'The rights, originally developed with major help from the United Kingdom Government, are no longer actually seen as British rights... Bringing these rights home will mean that the British people will be able to argue for their rights in the British courts... And there will be another distinct benefit. British judges will be enabled to make a distinctively British contribution to the development of the jurisprudence of human rights in Europe.'¹⁵

⁹ See J. Habermas, *Between Facts and Norms* (Cambridge: Polity Press, 1996); J. Habermas, *The Inclusion of the Other: Studies in Political Theory* (Cambridge MA: MIT Press, 1998).

¹⁰ See Francesca Klug, 'Political impasse proves need for a written constitution' Blogging the Bill of Rights, <http://www.guardian.co.uk>, May 11, 2010.

¹¹ *Rights Brought Home: The Human Rights Bill*, Cm 3782, October 1, 1997.

¹² See Francesca Klug, 'A Bill of Rights: Do We Need One or Do We Already Have One?' [2007] *Public Law* 701; Rabinder Singh, 'Interpreting bills of rights' [2008] *Statute Law Review* 82, 'I myself agree with Francesca Klug both that the HRA is a Bill of rights and not merely an incorporating measure but that it has not been accepted as such by the British public', p. 96.

¹³ E.g. *Rights Brought Home: The Human Rights Bill*, Cm 3782, October 1, 1997, para. 1.2. See A.W. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford: Oxford University Press, 2001).

¹⁴ See Jesse Norman and Peter Osborne, *Churchill's Legacy: The Conservative Case for the Human Rights Act* (London: Liberty, 2009), p. 6: 'We will also show that the repeated claim that the HRA is a charter for socialism and state interference is quite false. In fact, the HRA is a charter *against* socialism and state interference.' They argue that the Conservative Party should drop its opposition to the HRA and they also adopt a sceptical perspective on the need for a specifically British Bill of Rights (pp. 53-54).

¹⁵ *Rights Brought Home: The Human Rights Bill*, Cm 3782, October 1, 1997, para. 1.14.

Those five references to ‘British’ in one paragraph indicated that the new Labour Government accepted as a rationale for the HRA the general need for greater national ownership of Convention rights through engagement (practical use and judicial dialogue). It seems inescapable that a central element of the case for the enactment of the HRA was an expressly British state-based ‘liberal nationalist’ one.¹⁶

Several steps are used in the deployment of the argument in the White Paper. First, the problem that something shaped by the UK was no longer viewed as ‘British’. Second, the Government repeatedly noted the role the UK played, but also the influence that could be extended in Europe through further engagement by guiding the judicial conversations around the meaning of particular rights. Third, the Government highlighted the practical problems for ‘the British people’ involved in taking a case to Strasbourg, in terms of expense and delay. It was not that this route would now be closed off, but that the rights should be defended directly in local settings. The legal and political arguments marshalled in defence of the proposed new legislation were firmly embedded in nationalist rhetoric.¹⁷ This was to be a national reclaiming of an agenda that had British roots, and not the imposition of an ‘alien’ and European tradition. It is possible to dismiss this as a residual and pragmatic dimension of the political language of promoting constitutional reform, but it provides evidence that national ownership of rights was troubling politicians long before the new Bill of Rights debate re-emerged. Also, it was evidently viewed as significant enough to form a central plank of the case being made, in other words a legitimate basis for assessing whether the HRA ‘worked’. Those who laced the political rhetoric around the HRA with patriotic zeal paved the way for the nationalist critique that followed.¹⁸

Devolution was also a significant element of the constitutional reform programme, and in the human rights field the question arose of how to deal with Scotland, Wales and Northern Ireland.¹⁹ The approach to the devolution statutes has strong similarities (in the cases of Scotland and Northern Ireland in particular) but also subtle differences.²⁰ In line with established constitutional practice these devolved contexts were treated as ‘subordinate’, in the sense that the Convention rights would - in contrast to the Westminster Parliament – have (through the devolution statutes) more pointed implications,²¹ and the HRA would remain untouchable by them.²² The model adopted is intriguing, if unsurprising given the current constitutional structure of the UK. What it meant, however, was that the ‘Convention rights’ became a core feature of the architecture of the transforming ‘union state’. The new

¹⁶ See Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford: Oxford University Press, 2007); Will Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship* (Oxford: Oxford University Press, 2001); Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995); Will Kymlicka, *Liberalism, Community and Culture* (Oxford: Clarendon Press, 1989).

¹⁷ The reasons for this are complex and often pragmatic and reactive ones connected to, for example, anti-European sentiment. For discussions in the Westminster Parliament see Jonathan Cooper and Adrian Marshall-Williams (eds), *Legislating for Human Rights: The Parliamentary Debates on the Human Rights Bill* (Oxford: Hart Publishing, 2000).

¹⁸ See Jack Straw, ‘Let’s bring human rights home’ *Guardian*, October 26, 2010.

¹⁹ Vernon Bogdanor, *The New British Constitution* (Oxford: Hart Publishing, 2009) pp. 89- 119; Russell Deacon and Alan Sandry, *Devolution in the United Kingdom* (Edinburgh: Edinburgh University Press, 2007); Vernon Bogdanor, *Devolution in the United Kingdom* (Oxford: Oxford University Press, updated ed. 2001); Noreen Burrow, *Devolution* (London: Sweet & Maxwell, 2000).

²⁰ See Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (Oxford: Oxford University Press, 5th ed, 2004), chapters 7, (Barry K. Winetrobe), 8 (Christopher McCrudden), and 9 (Brigid Hadfield).

²¹ In fact, one impact is that devolved legislatures in Northern Ireland and Scotland are subjected to potentially much more intensive scrutiny and potential challenge than the Westminster Parliament, see JUSTICE, *Devolution and Human Rights* (London: JUSTICE, February 2010).

²² JUSTICE, *Devolution and Human Rights* (London: JUSTICE, February 2010).

constitutional design that emerged in the late 1990s was therefore infused with notions of rights which had different implications even within the UK's democratic structures. Again, the position is a state-based liberal nationalist one, anchored in an integrative vision of rights as part of the evolving 'new union'. This embodied and embraced a more inclusive view of the state (at least for the purposes of these rights), as one which recognised the importance of human rights and the need for them to be embedded securely within a constitutional reform process rather than separated off from it.

The point is made because of the persistence of the view that the HRA lacks a firm 'national basis', or sense of ownership. This is despite repeated attempts by advocates to embed it within an essentially nationalist narrative.²³ The top-down nature of the process did not assist, and the lack of consultation around its enactment in the late 1990s is also added as a reason why it has failed to capture a popular mood of support. Here the story is one of a national project that has not become sufficiently integrated politically (more than legally), raising the equally valid question of what test would have to be met before the rights were to be regarded as sufficiently 'British', or felt to be owned? From a purely outcome oriented perspective, and reflecting on the experience in, for example Northern Ireland, a stark point should be made here: the HRA exists in law and the process – however limited – led to the successful enactment of legislation. In the context of Bills of Rights processes this is an achievement not to be lightly dismissed.

There are several aspects to draw out. First, we need to ensure that central elements of this debate are not sidestepped. The process which resulted in the enactment of the HRA was driven by a liberal nationalist (British) narrative wedded to a grander (though still fairly piecemeal) project of constitutional renewal in the context of a state seeking to accommodate a range of sub-state nationalisms. In the last decade, the new Bill of Rights debate became bound up with questions of national identity. As is evident, nationalism (in all its forms) is not something that only resides in Scotland, Wales and Northern Ireland (with its two 'state-based' forms of nationalism), and further reflection on the elements of integrative and liberal British nationalism (evident in the discussions of both the HRA and any new Bill of Rights) should become part of the legal and political conversation about constitutional futures.

²³ Francesca Klug, "Solidity or Wind?" What's on the Menu in the Bill of Rights Debate? (2009) 80 *The Political Quarterly* 420, p. 426. In her critique of the Conservative Party position she suggests that the view 'ironically ignores the richness of this country's legacy, which led Eleanor Roosevelt to proclaim the Universal Declaration as the "Magna Carta" of all mankind and Winston Churchill to dream up the idea of the ECHR, which was drafted largely by British lawyers'.

Constitutional Confusion: What Counts as a Bill of Rights?

There is no universally agreed definition of what constitutes a 'Bill of Rights'.²⁴ As a result, one of the complicating factors is the argument that the HRA is *the* Bill of Rights for the UK. Why worry about a new Bill of Rights when the UK already has one? For example, Francesca Klug's book on the subject leaves little room for doubt; it is called *Values for a Godless Age: The Story of the United Kingdom's New Bill of Rights*.²⁵ Members of the judiciary, and many others,²⁶ have referred to it in precisely those terms, and it has often been regarded as such in international discussions.²⁷ This potentially risky route to a national Bill of Rights follows a model of statutory incorporation through the domestic enactment of a regional human rights instrument, giving it further effect in national law. On the issue of legitimacy, the political grounding for the process rested on the election of a new government in 1997 with an express manifesto commitment to constitutional reform, including human rights protection.²⁸ That government therefore could regard itself as democratically mandated to pursue this specified reform agenda (an admittedly thin basis for legitimising a Bill of Rights). Although the enactment of the HRA did not involve a widespread process of participation and consultation,²⁹ it still represents a credible basis for securing a 'Bill of Rights' within a parliamentary democracy, particularly given a general lack of definition.³⁰ But should this prevent further reflection or progress on the development of *another* Bill of Rights?

It has not blocked the emergence of a political debate about a new Bill of Rights and Responsibilities (or a separate Bill of Rights process emerging in Northern Ireland for very different reasons),³¹ and their now appears to be agreement that the Act has thus far 'failed to fulfil the symbolic requirements of a Bill of Rights'.³² This springs from a sense that whatever a Bill of Rights might be, the HRA may still just not quite be it. The Labour Party itself – once it had committed to the path of legislating for human rights – did espouse incorporation of the Convention as merely the first step, with 'our own Bill of Rights' being

²⁴ See Philip Alston, 'Bills of Rights in Comparative Perspective' in Philip Alston (ed), *Promoting Human Rights through Bills of Rights: Comparative Perspectives* (Oxford: Clarendon Press, 1999) chapter 1.

²⁵ (London: Penguin Books Ltd, 2000).

²⁶ Home Secretary's Speech at IPPR Conference, March 29, 2000.

²⁷ See, e.g. Philip Alston in his introduction to *Promoting Human Rights Through Bills of Rights* (1999, Oxford: Clarendon Press, 1999) pp. 1-14, at p. 1 refers to the HRA as an example of a Bill of Rights.

²⁸ Labour Party Election Manifesto (London: Labour Party, 1997). Devolution was also a central element, described as part of a process of 'strengthening the Union', '[t]he United Kingdom is a partnership enriched by distinct national identities and traditions'. Under the heading 'Real rights for citizens', it stated: 'Citizens should have statutory rights to enforce their human rights in the UK courts. *We will by statute incorporate the European Convention on Human Rights into UK law to bring these rights home and allow our people access to them in their national courts.*' (emphasis added).

²⁹ It was, however, the result of many years of sustained campaigning, see Michael Zander, *A Bill of Rights?* (London: Sweet & Maxwell, 4th ed., 1997).

³⁰ It should be noted that it was successful, in that the process ended with the enactment of human rights legislation. See also, Francesca Klug, "Solidity or Wind?" What's on the Menu in the Bill of Rights Debate? (2009) 80 *The Political Quarterly* 420.

³¹ See Colin Harvey and Alex Schwartz, 'Designing a Bill of Rights for Northern Ireland' (2009) 60 *Northern Ireland Legal Quarterly* 181; Colin Harvey and David Russell, 'A New Beginning for Human Rights Protection in Northern Ireland?' (2009) *European Human Rights Law Review* 748.

³² See Alice Donald, Philip Leach and Andrew Puddephatt, *Developing a Bill of Rights for the UK* (London: Equality and Human Rights Commission Research Report 51, 2010) p. 4. See also Francesca Klug, 'A bill of rights: do we need one or do we already have one?' [2007] *Public Law* 701, p. 713: 'Bills of rights are not just legal and constitutional documents. They have a symbolic role in highlighting the fundamental values that signify what a country stands for. They are intended to act as a baseline of common principles in a diverse society. Assessed against these criteria, the HRA has clearly failed to past muster'.

the ultimate objective; a commitment that, however, was gradually weakened (as a return to power became more likely).³³ This Bill of Rights debate spanned decades and emerged pre-HRA in a context where no such constitutional protection existed in statute law.³⁴ Many of the proposals and suggestions in these discussions did go beyond incorporation of the ECHR, and included a range of suggestions and a variety of models, and did reflect a commitment to other additional rights.³⁵

Klug argues that the loss of appetite for the second stage process was already known by those drafting the HRA.³⁶ Her view is that the HRA is a Bill of Rights and meets any available criteria for labelling it as such.³⁷ This is part of a connected agenda which is understandably protective of the Act and concerned about erosion of existing human rights standards. In a context where one of the major political parties – and now one of the parties of government – views repeal of the HRA as desirable this is a real problem. She acknowledges fully, however, that the HRA has failed to make any deeper constitutional connection with the public.³⁸ She lists three main elements which explain this: first, the Act was a ‘bolt out of the blue to most people’³⁹; no ‘strong narrative’ was developed about the Act⁴⁰; and finally, that it was too successful in making the life of government more uncomfortable.⁴¹ There is considerable merit in all these arguments. If the HRA is a Bill of Rights (and there is no reason to doubt that it is) then there appears to be agreement that

³³ Francesca Klug, ‘A bill of rights: do we need one or do we already have one?’ [2007] *Public Law* 701, at 704. See Labour Party, *A New Agenda for Democracy* (London: Labour Party, 1993) and Labour Party, *Bringing Rights Home* (1996, London, Labour Party) which included reference to next steps – no such references were to be found in the Labour Party manifesto of 1997. As Erdos notes, this Labour Party position was ‘won’ in the context of an extended argument within the party, David Erdos ‘Ideology, Power Orientation and Policy Drag: Explaining the Elite Politics of Britain’s Bill of Rights Debate’ (2009) 44 *Government and Opposition* 20, p. 26. In fact, the Labour Party had earlier made it clear that incorporation of Convention rights *could not* be a substitute for a home-grown Bill of Rights. Concerns on the left have included scepticism about enhanced power for the judiciary, and the possible emergence of a ‘juristocracy’, see R.Hirschl *Towards Juristocracy* (Cambridge MA: Harvard University Press, 2004), K. Ewing, ‘The Bill of Rights Debate: Democracy or Juristocracy in Britain’, in K.Ewing, C.Gearty and B.Hepple, *Human Rights and Labour Law: Essays for Paul O’Higgins* (London: Mansell, 1994) 147-187.

³⁴ For a history of the discussions see Michael Zander, *A Bill of Rights?* (London: Sweet & Maxwell, 4th ed, 1997) pp. 1-39.

³⁵ David Erdos ‘Ideology, Power Orientation and Policy Drag: Explaining the Elite Politics of Britain’s Bill of Rights Debate’ (2009) 44 *Government and Opposition* 20, p. 33. See Institute of Public Policy Research, *The Constitution of the United Kingdom* (London: IPPR, 1991); F. Klug, *A Peoples’s Charter: Liberty’s Bill of Rights: A Consultation Document* (London: NCCL, 1991).

³⁶ ‘As Labour’s “second stage bill of rights commitment” receded, so there was a push to draft the HRA “in lieu” of a bill of rights’, Francesca Klug, ‘A bill of rights: do we need one or do we already have one?’ [2007] *Public Law* 701, p. 705.

³⁷ She uses the criteria listed by Philip Alston, see Philip Alston, ‘A Framework for the Comparative Analysis of Bills of Rights’ in *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford: Oxford University Press, 1999) pp. 1-14. See also, Francesca Klug, ‘Solidity or Wind?’ What’s on the Menu in the Bill of Rights Debate?’ (2009) 80 *The Political Quarterly* 420, ‘The HRA was always intended to be more than the incorporation of a human rights treaty into domestic law’.

³⁸ Francesca Klug, ‘A bill of rights: do we need one or do we already have one?’ [2007] *Public Law* 701, p. 713.

³⁹ Francesca Klug, ‘A bill of rights: do we need one or do we already have one?’ [2007] *Public Law* 701, p. 713.

⁴⁰ Francesca Klug, ‘A bill of rights: do we need one or do we already have one?’ [2007] *Public Law* 701, p. 713.

⁴¹ See also David Erdos, ‘Smoke but No Fire? The Politics of a “British” Bill of Rights’ (2010) 81 *The Political Quarterly* 188, p. 191, ‘Even the relatively weak HRA has been experienced as a significant political irritant by the major parties’. See also K.D. Ewing and Joo-Cheong Tham, ‘The Continuing Futility of the Human Rights Act’ [2008] *Public Law* 668, p. 691 who note the role of the courts as irritants ‘rather than an obstacle’. Cf. Adam Tomkins, ‘The role of the courts in the political constitution’ (2010) 60 *University of Toronto Law Journal* 1-22 and Adam Tomkins, ‘National security and the role of the courts: a changed landscape?’ [2010] 126 *Law Quarterly Review* 543.

something remains absent from it. This opens the question of what that is and whether another Bill of Rights is a desirable way of remedying the problem.

Despite initial attempts to create a narrative, as noted above, this did not prove persuasive and there is little doubt that governmental discomfort with the Act's implications was also evident.⁴² While Labour Party support for the HRA became more vocal as the General Election of 2010 drew closer, mixed messages had emerged and became embedded in the public imagination. This is evidence again of the impact of the original lack of widespread engagement with the Act. The Labour Government did periodically (when not having profound concerns about its practical impact and expressing these publicly) try to defend the HRA, with a blend of progressive nationalist rhetoric and other arguments, but this continued as a half-hearted and an essentially 'top-down' process.

The problems that emerged are also suggestive of wider constitutional confusions and ambiguities (some constructive, some not) within the UK, where so much remains constitutionally contested. It is still possible, for example, to mount a sound argument from within the British constitutional tradition that the HRA is simply another Act of Parliament, no more and no less.⁴³ The HRA can be regarded as a Bill of Rights, but it appears to lack qualities that would secure its lasting status as such. The missing pieces are, however, locked inextricably into a more profound constitutional enterprise requiring sensitivity and respect for the UK in its modern form, extensive planning and preparation, and sustained engagement on the larger question of what it might mean to achieve a new constitutional settlement.

To be clear: if it is accepted that the HRA remains vital but is lacking in some respects, it makes sense to clarify what the problem is and discuss ways forward openly. However, those who believe that another Bill of Rights process will only involve minor constitutional tinkering are misguided; it should really be preceded by a larger constitutional conversation about how the UK is presently constituted and the future shape and nature of the 'union state'. Expecting a Bill of Rights to replace that more constitutionally mature conversation seems inappropriate and will only be another exercise in pragmatic avoidance.

Conversation without End? Deliberating on a Bill of Rights for the UK

It is now worth reflecting on moves beyond or away from the HRA, and how both the Labour Party and Conservative Party commenced consideration of a possible new Bill of Rights. There are several explanations for this policy drift, but over time politically, as Erdos argues (writing about this process as it has evolved over decades); it reflects the influence of 'liberalism' in both parties, as well as an understanding of the constitutional risks of executive domination.⁴⁴ Erdos, for example, notes that 'support for reform is much more likely to be forthcoming from actors sharing a non-executive-focused power orientation'.⁴⁵ The place of perceived current and future roles within government may prove as significant as ideological commitment, drawing attention to overall constitutional design but also helping to explain the positions the political parties have taken historically.⁴⁶ The current

⁴² See, as only one example, 'Revealed: Blair attack on human rights law' *The Observer*, May 14, 2006.

⁴³ See Adam Tomkins, *Public Law* (Oxford: Oxford University Press, 2003) pp. 123-124.

⁴⁴ See also David Erdos, 'Smoke but No Fire? The Politics of a "British" Bill of Rights' (2010) 81 *The Political Quarterly* 188; David Erdos, 'Ideology, Power Orientation and Policy Drag: Explaining the Elite Politics of Britain's Bill of Rights Debate' (2009) 44 *Government and Opposition* 20. He argues that the two factors that help explain this are 'an ideological commitment to social liberalism and a non-executive power orientation'.

⁴⁵ David Erdos, 'Ideology, Power Orientation and Policy Drag: Explaining the Elite Politics of Britain's Bill of Rights Debate' (2009) 44 *Government and Opposition* 20, pp. 27-28.

⁴⁶ David Erdos, 'Ideology, Power Orientation and Policy Drag: Explaining the Elite Politics of Britain's Bill of Rights Debate' (2009) 44 *Government and Opposition* 20, pp. 29-31. For example, the Conservative Party came

reconstruction of the actions of past administrations is clearly also a factor; the Labour Party arrived in power after eighteen years of Conservative Party rule, which it viewed as authoritarian in nature. The new Coalition government was elected in 2010 with a shared critique of what it saw as an authoritarian period of Labour Party rule.

While this accounts for the general approach to 'Bill of Rights' discussions over time, and the evident central role of power relations, the enactment of the HRA marked a moment when the conversation about the formal enactment of rights could conceivably have ended. Political parties and others felt that a new Bill of Rights debate needed to be re-ignited, particularly around 2006-2007. There were civil libertarian strands, but as noted above, also the strong influence of British state-based integrative imperatives (as well as expressed concerns about how the HRA had in fact functioned). These integrative imperatives included two elements. First, the attempt to re-assert a version of British liberal or constitutional nationalism as a way of grounding human rights. Second, a concern about how the Strasbourg Court interprets Convention rights. Both parties appeared apprehensive about the balances being struck in a way that reflected considerable anxiety about the statutory incorporation route of achieving a Bill of Rights. It is worth exploring the way this has advanced, what might be learned from it and what might happen next.

Charting a New Political Path

In a speech - which was framed by the challenges to be faced in the 'globalised twenty-first century' - to the Centre for Policy Studies in June 2006 - David Cameron presented a critique of the HRA, and made the case for a new British Bill of Rights.⁴⁷ The speech recognised the logic of the rationale for the Act,⁴⁸ as well as some positive results,⁴⁹ before turning to an analysis of how 'the Human Rights Act has made things worse'. Here the focus was on the allegedly adverse impact on tackling crime and terrorism, the thesis being that the Act had made it harder to deal with crime,⁵⁰ and had a 'similarly damaging impact on our ability to

to power in 1979 with a commitment to commence all-party talks on drafting a Bill of Rights; the Party soon changed its mind.

⁴⁷ David Cameron, 'Balancing freedom and security – a modern British Bill of Rights' June 26, 2006, Centre for Policy Studies; David Cameron, 'Rebuilding Trust in Politics' February 8, 2010, 'And it's why we will abolish the Human Rights Act and introduce a new Bill of Rights, so that Britain's laws can no longer be decided by unaccountable judges'; Dominic Grieve, 'Can the Bill of Rights do Better than the Human Rights Act?' November 30, 2009. His comments on the Northern Ireland process shed light on the Conservative Party view of socio-economic rights: 'In Northern Ireland, a Bill of Rights is under consideration, although the report of its Commission has proved controversial in its advocacy of socio-economic rights which are definitely not under consideration for a Conservative UK Bill of Rights.' 'Liberty and Community in Britain' October 2, 2006, Speech for the Conservative Liberty Forum, 'A Bill of Rights enables us to do exactly what was done in 1215, 1679 and 1689 – find a pragmatic legislative response to the dangers of excessive executive power and action in a period of discord.' Michael Howard, 'We must replace the Human Rights Act with a British Bill of Rights', November 22, 2009. See also Francesca Klug, 'Bill of rights: what's in a name?' *The Guardian* January 19, 2010, again noting the initial commitment in the 1979 Conservative Party manifesto to all-party talks on a bill of rights which disappeared once in office, and the evolution of the thinking of the Labour Party on the matter.

⁴⁸ 'The idea was to give people a clear sense of their rights in an increasingly complicated world. On the face of it, this seemed a logical step. Now, six years on from the Human Rights Act, we can assess exactly what the consequences have been – and their impact on the vital challenge of balancing freedom and security.'

⁴⁹ 'We should start by acknowledging that some of the direct consequences of the Human Rights Act have been positive ones.... One example is the right of an elderly married couple not to be separated in different care homes. Another is the right of the families of the deceased to be represented at coroner's inquests.' The speech also included a short section on the 'Failure of the HRA to protect our rights' which referred to the importance of the right to trial by jury, and the right to free speech in the context of legislation on religious hatred.

⁵⁰ Examples provided included the work of the Assets Recovery Agency, the case of a convicted rapist who was released on licence and then went on to commit murder, as well as the use or not of 'wanted posters'. For a response to some of this see Keir Starmer, Speech at the Royal Society of Medicine, October 21, 2009.

protect our society against terrorism'.⁵¹ The speech echoed a (by then) familiar theme, that the Act had 'helped to create a culture of rights without responsibilities'.⁵² After weighing up the options, David Cameron outlined 'the right approach' with the proposal for a 'modern British Bill of Rights that also balances rights with responsibilities'.

What were the components of this modern Bill of Rights? The first was an explicit link to national identity and 'the core values which give us our identity as a free nation'. Second, it should include 'the fundamental duties and responsibilities of people living in this country as citizens and foreign nationals'. Third, it should offer guidance to the 'judiciary and the Government in applying human rights law when the lack of responsibility of some individuals threatens the rights of others'. Fourth, it should protect 'fundamental liberties such as jury trial, equality under the law and civil rights'. And finally, it should include the ECHR 'in clearer and more precise terms'.

On process, the speech indicated that it would be difficult and could not be rushed, and that 'a satisfactory outcome depends upon achieving a *national consensus*' (emphasis added).⁵³ The aim was to ensure it 'cannot easily be repealed', thus there was a clear suggestion of possible entrenchment combined with positive comment about the example of the German Basic Law. The speech ended with a reference to 'a renewed sense of national cohesion' and 'a lasting contribution to the well-being of our country'.⁵⁴ Much of this was further underlined in a lecture delivered by Nick Herbert at the British Library on November 24, 2008, sponsored by the British Institute of Human Rights,⁵⁵ and in subsequent statements by Dominic Grieve and others.⁵⁶ The evolving position retained common themes: repeal of the HRA and the enactment of a new British Bill of Rights, achieved through national consensus and ownership.

'The intention is to develop a home grown document that can engage a wide public debate of the principles affecting both rights and liberties and ultimately, promote a sense of popular ownership of the concept, principles and content of human rights which we lack at present.'⁵⁷

Gordon Brown placed constitutional reform (based on shared values and a progressive understanding of British national identity) at the heart of his politics, and argued for it

⁵¹ The consequences of the *Chahal* case (1997) 23 EHRR 413 were again singled out here as an impediment to tackling terrorism. 'I believe it is wrong to undermine public safety – and indeed public confidence in the concept of human rights – by allowing highly dangerous criminals and terrorists to trump the rights of the people of Britain to live in security and peace.' See *Saadi v Italy* [2008] ECHR 37201/06.

⁵² As well as astutely picking up on the often expressed scepticism within the Labour Party itself: 'Tony Blair himself recognises this. It is why he keeps talking about reviewing the Human Rights Act and rebalancing the criminal justice system.'

⁵³ 'So I don't for a moment imagine that this is something that can be drafted by a few politicians in Westminster.' Reference is made to a 'panel of distinguished jurists and other experts who will help us with the drafting of this Bill'.

⁵⁴ See also, David Cameron, 'Rebuilding trust in politics' Speech, February 8, 2010.

⁵⁵ Nick Herbert, 'Rights without responsibilities – a decade of the Human Rights Act' Lecture at the British Library, November 24, 2008. In addition to many of the established themes, the lecture is also a plea for restored faith in parliamentary democracy and politics, '...we want a British Bill of Rights and Responsibilities to help us restore the place of Parliament and repair the separation of powers. Parliament should be deciding the great issues of the day'.

⁵⁶ Dominic Grieve, 'Liberty and Community in Britain' October 2, 2006. See also Michael Howard, 'We must replace the Human Rights Act with a British Bill of Rights' *The Blue Blog*, November 22, 2009.

⁵⁷ Dominic Grieve, 'Can the Bill of Rights do Better than the Human Rights Act?' November 30, 2009.

consistently during his time as Prime Minister and leader of the Labour Party.⁵⁸ There were early indications that there would be a further stage in the discussions of the human rights agenda,⁵⁹ as one part of a ‘new British constitutional settlement for our generation’.⁶⁰ Here again the history of Britain ‘leading the way’ in the development of rights and the progress of liberty and freedom was recited. The Labour Government’s Green Paper *The Governance of Britain* signalled that a British Bill of Rights and Duties (as it was then called) was now on the agenda of government and it was evident that there was a political mood of support for further reflection.⁶¹ Reference to a Bill of Rights was included in the chapter on ‘Britain’s Future: the citizen and the state’ which also addressed citizenship and national identity, common British values, the development of the constitution, and a British statement of values.⁶² These interlocking parts left little room for confusion on the view of the Bill of Rights and the progressive nationalist tone.⁶³ The terms of the debate had therefore been sketched out by both parties, but the conversation was now extending.

A Model Bill of Rights?

JUSTICE published a useful research report in 2007 with the purpose of informing the ongoing debate on a British Bill of Rights.⁶⁴ The starting point was that any new Bill of Rights should be ECHR-plus and a range of options were listed. These included: modernising and strengthening ECHR rights, guaranteeing common law rights, protecting certain economic, social and cultural rights, as well as the adoption of rights contained in international and overseas domestic Bills of Rights. In addition to covering subjects such as process, amendment, and enforcement, the report was careful to stress the need for realism

⁵⁸ Speech by Gordon Brown, Chancellor of the Exchequer, at the Fabian New Year Conference, London, January 14, 2006. ‘And this British patriotism is, in my view, founded not on ethnicity nor race, not just on institutions we share and respect, but on enduring ideals which shape our view of ourselves and our communities – values which in turn influence the way our institutions evolve. Yet as Jonathan Freedland has written in his “Bring Home the Revolution”, Britain is almost unique in that, unlike America and many other countries, we have no constitutional statement or declaration enshrining our objectives as a country; no mission statement defining purpose; and no explicitly stated vision of our future... So I believe it is imperative that we re-invigorate the constitutional reform agenda we began in 1997.’ See also his speeches on Britishness (February 27, 2007) and on liberty (October 25, 2007), ‘The debate about a Bill of Rights and Duties will be of fundamental importance to our liberties and to our constitutional settlement and opens a new chapter in the British story of liberty.’ The links evident here between ‘social democratic’ thought and constitutional patriotism (and to the US) reflect a wider debate, and in the US context similar views are to be found in the work of, for example, Richard Rorty, *Achieving our Country* (Cambridge MA: Harvard University Press, 1998), p. 38: ‘...and as long as the American Left remains incapable of national pride, our country will have only a cultural Left, not a political one.’ See also A. Le Sueur ‘Gordon Brown’s Constitutional Settlement’ [2008] *Public Law* 21.

⁵⁹ ‘At the same time, the next stage of our discussions of human rights should, as people such as Francesca Klug have argued, also take more fully into account the very British idea that individual rights are rooted in ideas of responsibility and community.’

⁶⁰ ‘Speech on Liberty’ October 25, 2007: ‘Today, Jack Straw is signalling the start of a national consultation on the case for a new British Bill of Rights and Duties – or, as I said in July, for moving towards a written constitution.’

⁶¹ *The Governance of Britain*, Cm 7170 (July 2007). For background on the evolution of this debate see Colin Harvey, ‘A British Bill of Rights?’ 453 *Fortnight* (June/July 2007).

⁶² *The Governance of Britain*, Cm 7170 (July 2007), pp. 53-62.

⁶³ ‘Progressive’ in the sense that national identity is here tied to notions of liberal nationalism.

⁶⁴ JUSTICE, *A British Bill of Rights: Informing the Debate* (London: JUSTICE, 2007).

and that the ‘draft content of a bill of rights should not be over-inclusive’.⁶⁵ The report also included a summary of the lessons on establishing a Bill of Rights from other jurisdictions.⁶⁶

The Joint Committee on Human Rights published a detailed report with recommendations on a Bill of Rights for the UK in August 2008.⁶⁷ The Committee argued for the adoption of a Bill of Rights and Freedoms expressly ‘for the UK’ (following the approach of the European Convention on Human Rights *and Fundamental Freedoms*), with specific recommendations and an outline provided.⁶⁸ This document injected further substance into the debate, and there are a number of points to stress. First, the Committee emphasised the importance of participation, ‘a Bill of Rights must emerge from an inclusive and participative process’.⁶⁹ This should include ‘sufficient consensus’ among the political parties, but need not encompass unanimity on all aspects of the instrument.⁷⁰ Second, the Committee noted the importance of the universal nature of *human* rights, stressing that this should be detached from a debate about citizenship (but noting that it would focus on ‘values regarded as particularly fundamental in the UK as a nation state’).⁷¹ While seeking to steer the debate away from a narrow nationalist agenda, the Committee inevitably acknowledged - as it had to - that a debate on a UK Bill of Rights would speak to wider discussions of national identity: ‘It is potentially a moment of national definition’.⁷² Third, the Committee concluded that there was a case for additional rights ‘which can be distilled from the UK’s distinctive tradition’.⁷³ Fourth, the Committee included a chapter on economic and social rights,⁷⁴ and proposed the inclusion of a right to a healthy and sustainable environment.⁷⁵ The popularity of these rights with the general public was contrasted with the level of party political disagreement.⁷⁶ The idea of parity of justiciability between all rights, and therefore the adoption of fully legally enforceable economic and social rights was rejected,⁷⁷ but the

⁶⁵ JUSTICE, *A British Bill of Rights: Informing the Debate* (London: JUSTICE, 2007), p. 110. ‘It is crucial to maintain an appropriate and achievable objective for British society and culture.’

⁶⁶ JUSTICE, *A British Bill of Rights: Informing the Debate* (London: JUSTICE, 2007), pp. 115-116.

⁶⁷ Joint Committee on Human Rights, *A Bill of Rights for the UK?* (10th August 2008, HL 165-I; HC 150-I, 29th report, 2007-08).

⁶⁸ Joint Committee on Human Rights, *A Bill of Rights for the UK?* (10th August 2008, HL 165-I; HC 150-I, 29th report, 2007-08).

⁶⁹ Joint Committee on Human Rights, *A Bill of Rights for the UK?* (10th August 2008, HL 165-I; HC 150-I, 29th report, 2007-08), p. 9, para. 12.

⁷⁰ Joint Committee on Human Rights, *A Bill of Rights for the UK?* (10th August 2008, HL 165-I; HC 150-I, 29th report, 2007-08), p.12, para. 25: ‘There needs to be sufficient consensus across party lines to make the process of adopting a Bill of Rights a truly constitutional event, rather than a party political one.’ In fact, they frame their report in terms of what sufficient consensus they could already ‘detect’ for moving the process onto the next stage.

⁷¹ Joint Committee on Human Rights, *A Bill of Rights for the UK?* (10th August 2008, HL 165-I; HC 150-I, 29th report, 2007-08), p. 27, para. 84.

⁷² Joint Committee on Human Rights, *A Bill of Rights for the UK?* (10th August 2008, HL 165-I; HC 150-I, 29th report, 2007-08), p. 28, para. 88.

⁷³ Joint Committee on Human Rights, *A Bill of Rights for the UK?* (10th August 2008, HL 165-I; HC 150-I, 29th report, 2007-08), p. 42 para. 146.

⁷⁴ Joint Committee on Human Rights, *A Bill of Rights for the UK?* (10th August 2008, HL 165-I; HC 150-I, 29th report, 2007-08), Chapter 5.

⁷⁵ Joint Committee on Human Rights, *A Bill of Rights for the UK?* (10th August 2008, HL 165-I; HC 150-I, 29th report, 2007-08), pp. 57-59.

⁷⁶ Joint Committee on Human Rights, *A Bill of Rights for the UK?* (10th August 2008, HL 165-I; HC 150-I, 29th report, 2007-08), p. 43.

⁷⁷ Joint Committee on Human Rights, *A Bill of Rights for the UK?* (10th August 2008, HL 165-I; HC 150-I, 29th report, 2007-08), p. 47, para. 167.

conclusion reached was that the case was made for recognition with some ‘careful drafting’.⁷⁸ The Committee concluded that the objections were not ‘objections of principle’ and the case had been made, using evidence from Justice Albie Sachs to support this.⁷⁹ The reference to South Africa is significant because the suggested model for enforcement is drawn from that example.⁸⁰ First, a positive duty is placed on the Government to ‘take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation’ of the rights.⁸¹ Second, an annual reporting duty is provided for the Government to Parliament ‘on the progress made during the previous year in realising the rights’.⁸² Third, it gives Parliament a role in determining eligibility on ‘grounds of nationality, residence or other status’.⁸³ Finally, the role of the courts is carefully defined and limited to an interpretative one with the possibility of reasonableness review ‘of the measures taken to achieve their progressive realisation’.⁸⁴ This is prefaced by a provision noting that the rights are ‘not enforceable by individuals against the Government or any public authority’.⁸⁵ The Committee therefore presented a cautious case for the inclusion of social and economic rights in a Bill of Rights and Freedoms.

The relationship between Parliament, the executive and the courts is given detailed consideration.⁸⁶ Which model would the Committee recommend? The Committee was not persuaded that the courts should have the power to strike down legislation, instead preferring an approach that mirrored the HRA, and it supported an enhanced role for Parliament.⁸⁷ The Committee suggested a number of practical ways the role of Parliament could be further strengthened. These included, for example, ‘full statements of compatibility’ which provide a fully reasoned case.⁸⁸ In this spirit, the Committee also recommended that following a declaration of incompatibility the Government should initiate a debate in Parliament on the matter within a set time period, and might also be required to provide an account to the court

⁷⁸ Joint Committee on Human Rights, *A Bill of Rights for the UK?* (10th August 2008, HL 165-I; HC 150-I, 29th report, 2007-08), p. 52, para. 191.

⁷⁹ Joint Committee on Human Rights, *A Bill of Rights for the UK?* (10th August 2008, HL 165-I; HC 150-I, 29th report, 2007-08), p. 52, para. 191. In fact the Committee reached the conclusion that inclusion of social and economic rights might assist in tackling some of the perceptions about rights and ‘would be far more effective in countering that misperception than the Government’s attempt to link rights with responsibilities in the popular imagination’, see p. 56, para. 197.

⁸⁰ Joint Committee on Human Rights, *A Bill of Rights for the UK?* (10th August 2008, HL 165-I; HC 150-I, 29th report, 2007-08), p. 53 para. 192. See generally on the South African approach Sandra Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Claremont: Juta and Co. Ltd, 2010).

⁸¹ Joint Committee on Human Rights, *A Bill of Rights for the UK?* (10th August 2008, HL 165-I; HC 150-I, 29th report, 2007-08), p. 53 para. 192. The rights relate to health care, education, housing and an adequate standard of living. The Committee noted that these would be included initially, with the possibility of additional rights being added in the future, see p. 56 para. 196.

⁸² Joint Committee on Human Rights, *A Bill of Rights for the UK?* (10th August 2008, HL 165-I; HC 150-I, 29th report, 2007-08), p. 53 para. 192.

⁸³ Joint Committee on Human Rights, *A Bill of Rights for the UK?* (10th August 2008, HL 165-I; HC 150-I, 29th report, 2007-08), p. 53 para. 192.

⁸⁴ Joint Committee on Human Rights, *A Bill of Rights for the UK?* (10th August 2008, HL 165-I; HC 150-I, 29th report, 2007-08), p. 53 para. 192. In assessing reasonableness the provision lists 10 relevant considerations which are drawn from the South African case law, see p. 55, para. 194.

⁸⁵ Joint Committee on Human Rights, *A Bill of Rights for the UK?* (10th August 2008, HL 165-I; HC 150-I, 29th report, 2007-08), p. 53 para. 192.

⁸⁶ Joint Committee on Human Rights, *A Bill of Rights for the UK?* (10th August 2008, HL 165-I; HC 150-I, 29th report, 2007-08), Chapter 7, pp. 60-67.

⁸⁷ Joint Committee on Human Rights, *A Bill of Rights for the UK?* (10th August 2008, HL 165-I; HC 150-I, 29th report, 2007-08), p. 61, para. 218.

⁸⁸ Joint Committee on Human Rights, *A Bill of Rights for the UK?* (10th August 2008, HL 165-I; HC 150-I, 29th report, 2007-08), pp. 62-63 para. 226.

of what it had done to implement the judgment.⁸⁹ A periodic review (every five years) by an independent panel, to report to Parliament, was also recommended.⁹⁰ The Committee was not in favour of any special procedure for entrenchment, preferring to hold to the established position of allowing each Parliament to legislate as it might wish.⁹¹ On emergencies and derogations, the Committee highlighted the need for parliamentary and judicial safeguards, noting that at present derogation ‘is currently an essentially executive function’.⁹² Although the judicial role is defined with care in the Committee’s report, it also stressed the importance of judicial appointments and the ongoing need for a more diverse judiciary.⁹³

The Committee included a chapter on ‘responsibilities’, with an attempt made to grapple with somewhat vague governmental intentions.⁹⁴ A concern emerged here that by promoting the message ‘rights and responsibilities’ the Government might be lending credibility to those who promoted myths about the HRA, rather than seeking to challenge those misperceptions.⁹⁵ In fact, the Committee believed that ‘the Government is saying no more than that rights are capable of being limited by competing interests’.⁹⁶ As is pointed out, this is already an embedded part of human rights law and a matter for education rather than inclusion in a new Bill of Rights.⁹⁷ The Committee ruled out the proposal that it be called either a Bill of Rights and Duties or a Bill of Rights and Responsibilities, but did seek to clarify what the proper role of responsibilities might be in the debate.⁹⁸ On the issue of horizontality, the Committee recommended that the HRA approach form the basis for any new Bill of Rights provisions.⁹⁹

The process for developing a Bill of Rights can be as important as its substance. The Committee acknowledged that it might be difficult to ignite a debate around Bills of Rights in Britain, but noted that it remained important to get this right.¹⁰⁰ Looking at recent examples

⁸⁹ Joint Committee on Human Rights, *A Bill of Rights for the UK?* (10th August 2008, HL 165-I; HC 150-I, 29th report, 2007-08), p. 63, para. 228.

⁹⁰ Joint Committee on Human Rights, *A Bill of Rights for the UK?* (10th August 2008, HL 165-I; HC 150-I, 29th report, 2007-08), pp. 63-64, para. 232.

⁹¹ Joint Committee on Human Rights, *A Bill of Rights for the UK?* (10th August 2008, HL 165-I; HC 150-I, 29th report, 2007-08), p. 64 para. 235. Although the Committee did point to the limited measure of entrenchment against implied repeal achieved by the Human Rights Act, see p. 65, para. 238.

⁹² Joint Committee on Human Rights, *A Bill of Rights for the UK?* (10th August 2008, HL 165-I; HC 150-I, 29th report, 2007-08), p. 65, para. 242.

⁹³ Joint Committee on Human Rights, *A Bill of Rights for the UK?* (10th August 2008, HL 165-I; HC 150-I, 29th report, 2007-08), pp. 66-67.

⁹⁴ Joint Committee on Human Rights, *A Bill of Rights for the UK?* (10th August 2008, HL 165-I; HC 150-I, 29th report, 2007-08), Chapter 8. The Committee found the Government’s thinking to be ‘extremely muddled’, p. 71, para. 264.

⁹⁵ Joint Committee on Human Rights, *A Bill of Rights for the UK?* (10th August 2008, HL 165-I; HC 150-I, 29th report, 2007-08), pp. 71-72.

⁹⁶ Joint Committee on Human Rights, *A Bill of Rights for the UK?* (10th August 2008, HL 165-I; HC 150-I, 29th report, 2007-08), p. 73, para. 273.

⁹⁷ Joint Committee on Human Rights, *A Bill of Rights for the UK?* (10th August 2008, HL 165-I; HC 150-I, 29th report, 2007-08), p. 73, para. 273.

⁹⁸ Joint Committee on Human Rights, *A Bill of Rights for the UK?* (10th August 2008, HL 165-I; HC 150-I, 29th report, 2007-08), p. 73, para. 274. It did not, however, rule out the possibility that responsibilities could be mentioned in the preamble, with further recognition in a limitations clause.

⁹⁹ Joint Committee on Human Rights, *A Bill of Rights for the UK?* (10th August 2008, HL 165-I; HC 150-I, 29th report, 2007-08), pp. 75-78.

¹⁰⁰ Joint Committee on Human Rights, *A Bill of Rights for the UK?* (10th August 2008, HL 165-I; HC 150-I, 29th report, 2007-08), p. 80.

from Northern Ireland and Australia, the Committee laid out minimum requirements for any process, including a list of ‘non-negotiables’.¹⁰¹

The Government responded to the Joint Committee’s proposals in the form of a memorandum on 18 December 2008, published as part of the Committee’s report in January 2009.¹⁰² This signalled the Government’s intention not to detract or resile from the Convention rights in the HRA,¹⁰³ underlined its focus on the universality of rights, with a particular stress on the connection to common values and principles of all people within the UK.¹⁰⁴ On economic and social rights, the Government reiterated the well-trodden ground that ‘resource allocation in the socio-economic sphere...should, in its view, remain a matter for democratically accountable institutions of government’, but did not rule out the inclusion of some discussion of the ‘domestic formulations’ of economic and social rights from a future consultation.¹⁰⁵ The commitment to the inclusion of the concept of ‘responsibilities’ was confirmed, indeed the Government emphasised that these should have a ‘prominent place in any future Bill of Rights and Responsibilities’.¹⁰⁶ On process, and noting experiences in Northern Ireland, the Government expressed caution ‘about referral to an independent body’.¹⁰⁷

In March 2009, the Ministry of Justice published a Green Paper *Rights and Responsibilities: developing our constitutional framework*.¹⁰⁸ This followed the constitutional reform proposals outlined in the earlier Green Paper *The Governance of Britain*, which contained the original suggestion of a new British Bill of Rights and Duties.¹⁰⁹ As noted, before either of these documents was produced, the Conservative Party Leader, David Cameron had already proposed the repeal of the HRA and its replacement with a new Bill of Rights and Responsibilities.¹¹⁰

The history of the Labour Party’s change of heart on human rights (and Bills of Rights) is well known; as it was slowly persuaded of the possible merits of such an

¹⁰¹ Joint Committee on Human Rights, *A Bill of Rights for the UK?* (10th August 2008, HL 165-I; HC 150-I, 29th report, 2007-08), pp. 85-92. The list of non-negotiables can be found at p. 91, para. 353.

¹⁰² Joint Committee on Human Rights *A Bill of Rights for the UK? Government Response to the Committee’s Twenty-ninth Report of Session 2007-08* (2008-09) HL Paper 15, HC 145.

¹⁰³ ‘The Government regards the Human Rights Act as painting only part of the picture of the rights we enjoy, the responsibilities we owe to each other and the values we share as members of UK society.’ Joint Committee on Human Rights *A Bill of Rights for the UK? Government Response to the Committee’s Twenty-ninth Report of Session 2007-08* (2008-09) HL Paper 15, HC 145, p. 14.

¹⁰⁴ Joint Committee on Human Rights *A Bill of Rights for the UK? Government Response to the Committee’s Twenty-ninth Report of Session 2007-08* (2008-09) HL Paper 15, HC 145, pp. 15-16. In response the Joint Committee stated: ‘We also welcome the Government’s acknowledgement that the articulation of common values and principles that bind us together is separate from the fact that certain more specific rights and entitlements within the UK may depend on nationality and immigration status. We look forward to the debate about rights and duties being separated from the debate about what should be contained in any UK Bill of Rights.’ p. 6.

¹⁰⁵ Joint Committee on Human Rights *A Bill of Rights for the UK? Government Response to the Committee’s Twenty-ninth Report of Session 2007-08* (2008-09) HL Paper 15, HC 145, pp. 19-20.

¹⁰⁶ Joint Committee on Human Rights *A Bill of Rights for the UK? Government Response to the Committee’s Twenty-ninth Report of Session 2007-08* (2008-09) HL Paper 15, HC 145, p. 26.

¹⁰⁷ Joint Committee on Human Rights *A Bill of Rights for the UK? Government Response to the Committee’s Twenty-ninth Report of Session 2007-08* (2008-09) HL Paper 15, HC 145, p. 28. The Joint Committee responded: ‘We recommend that the Government follow the recent Australian example of appointing an independent committee to conduct a national consultation on the whole range of options for a Bill of Rights for the UK.’

¹⁰⁸ Cm 7577, March 2009. For comment see, Pavlos Eleftheriadis, ‘On Rights and Responsibilities’ [2010] *Public Law* 33.

¹⁰⁹ Cm 7170, July 2007.

¹¹⁰ ‘Balancing Freedom and Security: A modern British Bill of Rights’, June 26, 2006.

instrument in the early 1990s.¹¹¹ The new approach was not, however, one confined to incorporation of the Convention only. This was viewed as phase one, with an all-party commission drafting a Bill of Rights for consideration by Parliament the next step. In some senses, the publication of *Rights and Responsibilities* was a logical outworking of thinking already developed by the Labour Party during its time in opposition. The stress placed on the symbolic and cultural roles of a Bill of Rights is clear throughout, as is the importance of such constitutional measures to notions of national identity.¹¹² The document attempts to address the question of responsibilities in more detail, delving intriguingly into the realms of political philosophy.¹¹³ Here an argument is developed, which will be familiar to anyone who has followed the rights debate: society is 'less deferential' and 'more consumerist', it is 'atomised' and people see each other as 'customers rather than citizens', 'rights have become commoditised'.¹¹⁴ The suggestion is that a clearer statement is needed of the 'proper relationship between rights and responsibilities' and that this 'could foster a better understanding of those rights'.¹¹⁵ The aim appears not to make rights in any way contingent upon responsibilities (or to 'impose a series of new legally enforceable duties'),¹¹⁶ but the sense that the concept has simply lost out to rights in practice. Testing such a claim is difficult, but it reflects an often heard view (from the political left and right) that the absolutist assertion of rights can be divisive, and damage 'the cohesion and stability of society'.¹¹⁷ The document recognised that responsibilities are woven into the law of human rights (in fact it cites international and comparative material in support of the argument), and notes that all key participants tend to accept this.¹¹⁸

The document also explored substantive areas which might be addressed, and reflected the scepticism held by government and the major political parties in Britain on the creation of fully justiciable social and economic rights.¹¹⁹ However, the idea of adopting constitutional principles (a directive principles based approach) which would reaffirm 'existing welfare provisions' was not ruled out.¹²⁰

¹¹¹ Michael Zander, *A Bill of Rights?* (4th ed. 1997) pp. 30-39. Labour Party, *A new agenda for democracy: Labour's proposals for constitutional reform* (September 1993).

¹¹² *Rights and Responsibilities: developing our constitutional framework*, Cm 7577, March 2009, para. 17: 'The Canadian Charter of Rights and Freedoms 1982, which built on the International Convention [sic] on Civil and Political Rights, has served to provide a common framework for the various provinces in the Canadian federation. Since its inception it has become a symbol of Canadian identity.'

¹¹³ *Rights and Responsibilities: developing our constitutional framework*, Cm 7577, March 2009. Hobbes, Locke, Rousseau, Mill, Paine and Smith are all cited, but as Eleftheriadis notes, some of the leading figures from the last few decades are not, Pavlos Eleftheriadis, 'On Rights and Responsibilities' [2010] *Public Law* 33.

¹¹⁴ *Rights and Responsibilities: developing our constitutional framework*, Cm 7577, March 2009, para. 2.15. On the theme of the value of rights as intrinsic to human dignity and in combination with duties and responsibilities, see also Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church* (London: Burns & Oates, 2005); and Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: The Free Press, 1991).

¹¹⁵ *Rights and Responsibilities: developing our constitutional framework*, Cm 7577, March 2009, para. 2.18. See also Liora Lazarus, Benjamin Goold, Rajendra Desai and Qudsi Rasheed, *The relationship between rights and responsibilities* (London: Ministry of Justice Research Series 18/09, 2009). This valuable research project concludes with three major recommendations: first, there might be merit in providing within a Bill of Rights and Responsibilities a general duty to respect the human rights of others; second, that specific duties should not be included, but there might be room for some reference to this in a preamble; and third, duties must remain non-justiciable.

¹¹⁶ *Rights and Responsibilities: developing our constitutional framework*, Cm 7577, March 2009, para. 2.39.

¹¹⁷ *Rights and Responsibilities: developing our constitutional framework*, Cm 7577, March 2009, para. 2.24.

¹¹⁸ *Rights and Responsibilities: developing our constitutional framework*, Cm 7577, March 2009, para. 2.25.

¹¹⁹ *Rights and Responsibilities: developing our constitutional framework*, Cm 7577, March 2009, para. 3.52.

¹²⁰ *Rights and Responsibilities: developing our constitutional framework*, Cm 7577, March 2009, para. 3.53.

Towards the end, some consideration is given to devolution in Northern Ireland, Scotland and Wales.¹²¹ There is an express commitment that the proposals should not detract ‘from the process relating to a potential Bill relating to the particular circumstances of Northern Ireland’.¹²² The scale of the constitutional conversation that will be required for such a project to progress was recognised, something that was acknowledged in the *Governance of Britain* Green Paper as well.¹²³

The EHRC response to *Rights and Responsibilities* was published in spring 2010, and underlined its desire to defend current protections and ‘advocate for better protection’.¹²⁴ The EHRC outlined its principled approach, noted the relevant outcomes of its Human Rights Inquiry - including the ‘substantial lack of understanding of human rights’ and absence of political leadership, the essential components of a new Bill of Rights as well as issues that would go beyond the HRA (including ‘responsibilities’).¹²⁵ The EHRC reiterated the view that rights ‘can never be made contingent on the exercise of responsibilities’ but indicated there may be room to acknowledge the responsibility to protect the rights of others and there might be a possibility to include a statement of responsibilities as part of a preamble or similar instrument.¹²⁶ On particular substantive areas, the EHRC’s suggestions included a constitutional right to equality¹²⁷ and a recommendation that government should consult on ‘the full range of possibilities regarding the possible incorporation of socio-economic rights; which could have immediate effect; and whether some or all could be justiciable in some way’.¹²⁸

In March 2010, the Ministry of Justice published a summary of responses to *Rights and Responsibilities*,¹²⁹ as well as *People and power: shaping democracy, rights and responsibilities*, a report which ‘outlines findings from a programme of deliberative engagement that took place in late 2009 and early 2010, which explored the potential for constitutional change’.¹³⁰ What did this work reveal? The Summary of Responses does just that, setting out the positions advanced during the consultation process. Large measures of

¹²¹ *Rights and Responsibilities: developing our constitutional framework*, Cm 7577, March 2009, para. 4.32 ff.

¹²² *Rights and Responsibilities: developing our constitutional framework*, Cm 7577, March 2009, para. 4.38.

¹²³ *Governance of Britain*, Cm 7170, July 2007, para. 213.

¹²⁴ Equality and Human Rights Commission, *HRA Plus: Human Rights for 21st-century Britain* (London: EHRC, 2010).

¹²⁵ Equality and Human Rights Commission, *HRA Plus: Human Rights for 21st-century Britain* (London: EHRC, 2010), p. Iii: ‘Responsibilities are already embedded in a number of ways into the domestic and international human rights frameworks. The current debate however, indicates that not only is there a lack of understanding of human rights generally, but that there is a particular lack of understanding of the existing role of responsibilities.’

¹²⁶ Equality and Human Rights Commission, *HRA Plus: Human Rights for 21st-century Britain* (London: EHRC, 2010), p. Iii.

¹²⁷ Equality and Human Rights Commission, *HRA Plus: Human Rights for 21st-century Britain* (London: EHRC, 2010), p. Iv.

¹²⁸ Equality and Human Rights Commission, *HRA Plus: Human Rights for 21st-century Britain* (London: EHRC, 2010), p. V.

¹²⁹ Ministry of Justice, *Rights and Responsibilities: developing our constitutional framework – Summary of Responses* (Cm 7860, March 2010).

¹³⁰ Ministry of Justice, *People and power: shaping democracy, rights and responsibilities* (March 30, 2010). See The Minister of State, Ministry of Justice (Michael Wills) Written Ministerial Statement, March 30, 2010: ‘The reports bring to a conclusion key aspects of the first stage of public debate initiated by ‘The Governance of Britain’ Green Paper in July 2007. They also meet the commitment in ‘Building Britain’s Future’ to complete a national consultation on a Bill of Rights and Responsibilities during 2009-10.’ The Minister made clear the Government’s commitment to the Human Rights Act: ‘In taking forward work on a new Bill of Rights and Responsibilities, the Government remains committed to the Human Rights Act and the protections and remedies provided by it. It is encouraging to see the responses to the Green Paper support the Government’s view on this point. The Government are proud of the Human Rights Act and will not resile from it.’

agreement appear evident, with the proposal that there should be no retreat from the HRA, clarity that people are generally ‘resistant to the idea that fundamental human rights should be contingent on responsibilities...’¹³¹ and ‘consensus in favour of including rights to healthcare, housing, education and an adequate standard of living’.¹³² The document also included the Government’s view that a basis existed for taking this work forward:

‘The responses to the Green Paper, combined with the programme of deliberative research, have reached in the region of 2500 people and shown an appetite for both further debate on a Bill of Rights and Responsibilities (as well as a broader range of constitutional issues) and support in principle for the Government taking forward a Bill.’¹³³

What did the independent deliberative research reveal? On the issue of a ‘Statement of Values’, the research found positive reaction and support, with some scepticism in Scotland.¹³⁴ A number of principles emerged around any future process: the extensive involvement of the public; the need for ‘reasoned and informed debate’; ‘have national relevance and oversight’; and ‘involve a professional writer’.¹³⁵

The research on the Bill of Rights and Responsibilities revealed levels of support, with particular reference to the awareness-raising opportunities, suggestive of a lack of understanding of what rights already exist.¹³⁶ It showed support for a Bill of Rights which included social and economic rights, as well as the use of rights and responsibilities as complementary concepts.¹³⁷ The research also found public concern about the assertion of rights by those viewed as ‘undeserving’.¹³⁸ The research concluded that people remained undecided on the question of a written constitution.¹³⁹

Human Rights and the General Election 2010

The evolving debate stalled due to the UK General Election 2010, but its possible future scope was evident in the party manifestos adopted. The Labour Party committed to establishing an All Party Commission ‘to chart a course to a Written Constitution’ with the

¹³¹ Ministry of Justice, *Rights and Responsibilities: developing our constitutional framework – Summary of Responses* (Cm 7860, March 2010), p. 12, para. 3.

¹³² Ministry of Justice, *Rights and Responsibilities: developing our constitutional framework – Summary of Responses* (Cm 7860, March 2010), p. 17, para. 28.

¹³³ Ministry of Justice, *Rights and Responsibilities: developing our constitutional framework – Summary of Responses* (Cm 7860, March 2010), p. 23, para. 49. The document contains a commitment to take the work forward in the next Parliament on the basis of support for building on the HRA (paras 51-52). See also para. 55: ‘The Government believes we have reached a cross-road on our constitutional journey. Now is the time to create a new constitutional settlement that meets the aspirations of the UK public with a more equitable distribution of power that places Parliament and the people at its heart.’

¹³⁴ Ministry of Justice, *People and power: shaping democracy, rights and responsibilities* (March 30, 2010), Executive summary p. 5: ‘Though such a statement is viewed as most effective when part of a wider suite of documents that enforce those values; the practical application of this is complex.’

¹³⁵ Ministry of Justice, *People and power: shaping democracy, rights and responsibilities* (March 30, 2010), Executive summary p. 4.

¹³⁶ Ministry of Justice, *People and power: shaping democracy, rights and responsibilities* (March 30, 2010), Executive summary, p.4.

¹³⁷ Ministry of Justice, *People and power: shaping democracy, rights and responsibilities* (March 30, 2010), Executive summary pp. 5-6.

¹³⁸ Ministry of Justice, *People and power: shaping democracy, rights and responsibilities* (March 30, 2010), p. 35.

¹³⁹ Ministry of Justice, *People and power: shaping democracy, rights and responsibilities* (March 30, 2010), p. 55.

guarantee that the HRA would not be repealed (and no reference to a Bill of Rights).¹⁴⁰ The Conservative Party indicated that it would ‘replace the Human Rights Act with a UK Bill of Rights’ in order to ‘protect our freedoms from state encroachment and encourage greater social responsibility’.¹⁴¹ The Liberal Democrat Manifesto promised to protect the HRA, but contained no reference to a Bill of Rights.¹⁴² However, the party has been committed to a written constitution for the UK, with a Bill of Rights, for some time.¹⁴³ Each of the main parties at Westminster therefore advanced some form of either defensive or proactive post-election constitutional conversation which would involve human rights.

What about some of the other political parties in the UK? In Northern Ireland, the Democratic Unionist Party opposed a Northern Ireland Bill of Rights and while ‘unconvinced’ of the need for a UK Bill of Rights it would be ‘infinitely more appropriate than the Northern Ireland version envisaged by rights zealots’.¹⁴⁴ The Sinn Féin manifesto included a section on equality and human rights; it stressed the importance of ‘a strong, inclusive, broad, fully enforceable Bill of Rights for the north, including enforceable economic and social rights, as required under the Good Friday Agreement’.¹⁴⁵ Following the Conservative Party lead, and their pre-election agreement, the Ulster Unionist Party indicated that it would ‘replace the Human Rights Act with a UK Bill of Rights’.¹⁴⁶ The Social Democratic and Labour Party agreed to continue ‘lobbying for a strong Bill of Rights for Northern Ireland’.¹⁴⁷ The Alliance Party of Northern Ireland expressed support for a ‘realistic Northern Ireland Bill of Rights with cross-community support’ and called for a written constitution for the UK.¹⁴⁸ On the UK Bill of Rights, it argued that the main principle should be ‘no regression on the Human Rights Act’.¹⁴⁹ The Scottish Nationalist Party stressed that it would ‘oppose plans to repeal the Human Rights Act’.¹⁵⁰ In Wales, the Plaid Cymru manifesto contained no reference to the HRA or the Bill of Rights, but did refer to ‘European standards on employment rights’ with a ‘call for a binding Charter of Fundamental Rights’.¹⁵¹

Following the UK General Election, and the formation of the new coalition (Conservative Party and Liberal Democrats) an extensive programme for government was published.¹⁵² This programme for ‘partnership government’ includes a section on civil liberties which commits the coalition to the establishment of ‘a Commission to investigate the creation of a British Bill of Rights that incorporates and builds on our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in

¹⁴⁰ The Labour Party Manifesto 2010, 9:3.

¹⁴¹ ‘Invitation to Join the Government of Britain’ Conservative Party Manifesto 2010 (2010), p. 79.

¹⁴² Liberal Democrat Manifesto 2010, p. 94.

¹⁴³ However, as Francesca Klug noted in 2009: ‘Perhaps surprisingly, it is the Liberal Democrats, the long-time supporters of a bill of rights, who have expressed strong reservations about the way the current debate is framed’, Francesca Klug “*Solidity or Wind?*” What’s on the Menu in the Bill of Rights Debate?” (2009) 80 *The Political Quarterly* 420.

¹⁴⁴ DUP, ‘Let’s Keep Northern Ireland Moving Forward: Manifesto 2010’ (Belfast: DUP, 2010), p. 68.

¹⁴⁵ Sinn Féin, ‘2010 Westminster Election Manifesto’, (2010), p. 35. There is no reference to the HRA, but support for a Charter of Rights for the island of Ireland.

¹⁴⁶ Conservatives and Unionists Manifesto 2010, ‘Invitation to Join the Government of the United Kingdom’ (2010), p. 68.

¹⁴⁷ SDLP, ‘For your Future: SDLP Westminster Manifesto 2010’ (2010), p. 23: ‘We remain convinced that a Bill of Rights can support the common ground that does exist in our society, and provide protections and principles upon which we can agree despite our differences’. There is no reference to the HRA but support for a Charter of Rights for all victims of crime.

¹⁴⁸ Alliance Party of Northern Ireland, ‘Alliance Works: Working for You at Westminster’ (2010), p. 5.

¹⁴⁹ Alliance Party of Northern Ireland, ‘Alliance Works: Working for You at Westminster’ (2010), p. 30.

¹⁵⁰ SNP, ‘Elect a local champion: Manifesto 2010’ (2010), p. 16.

¹⁵¹ Plaid Cymru, ‘Think Different. Think Plaid.’ (2010), p. 24.

¹⁵² The Coalition, ‘Our programme for government – Freedom, Fairness, Responsibility’ (London: HMG, 2010).

British law, and protects and extends British liberties. We will seek to promote a better understanding of the true scope of these obligations and liberties'.¹⁵³ The language employed marks a return to a linkage between national identity and rights/liberties (although it has subsequently been clarified that UK Bill of Rights rather than British was intended), prefers references to the ECHR rather than the HRA, is couched generally around civil liberties (an early theme of the Coalition Government) and does not mention responsibilities.¹⁵⁴

The commitment to advancing this work was underlined in the Ministry of Justice Business Plan 2011-2015, and the care taken with the wording used in the negotiated text confirmed in the evidence given by Kenneth Clarke (Secretary of State for Justice) and Lord McNally (Minister of State) to the Joint Committee on Human Rights in November 2010.¹⁵⁵

Human Rights Commissions and Devolutionary Complexity

What view have the human rights commissions in the UK taken on this emerging debate? The position of the EHRC was outlined above, as it moved to respond to developments. Its view has also been informed by a research project commissioned to explore the development of the UK process in comparative perspective,¹⁵⁶ as well as other work undertaken by the Commission (including its inquiry into the HRA).¹⁵⁷ The project reported several significant findings, including that the 'current circumstances for any process to create a new UK Bill of Rights are unfavourable'.¹⁵⁸ It also made clear the variance in comparative approaches and practices. From the Canadian example of a Charter of Rights and Freedoms - inspired by the determination of Prime Minister Pierre Trudeau to forge 'a source of Canadian values and unity in the face of separatist tendencies in Quebec',¹⁵⁹ - to the process of democratic transition in South Africa.¹⁶⁰ As the report notes, '[p]ublic understanding of, and enthusiasm for, a Bill of Rights is not assured and there is little discernible popular or civil society

¹⁵³ The Coalition, 'Our programme for government – Freedom, Fairness, Responsibility' (London: HMG, 2010), p. 11. This is framed in the context of the following statement: 'The Government believes that the British state has become too authoritarian, and that over the past decade it has abused and eroded fundamental human freedoms and historic civil liberties. We need to restore the rights of individuals in the face of encroaching state power, in keeping with Britain's tradition of freedom and fairness.'

¹⁵⁴ The Liberal Democrats have made their opposition to repeal of the HRA clear. This appears to confirm the argument that 'the option of "constitutional smoke", which combines lengthy debate on a British Bill of Rights followed by relatively cosmetic change, constitutes a dominant strategy for both parties [Conservative and Labour]', See David Erdos, 'Smoke but No Fire? The Politics of a "British" Bill of Rights' (2010) 81 *The Political Quarterly* 188, p. 196, written before the general election. Note the intervention by the President of the European Court of Human Rights – Jean-Paul Costa – in June 2010 indicating that repeal of the HRA would be a bad idea and that a British Bill of Rights would 'create a complex situation', *Guardian* June 28, 2010.

¹⁵⁵ See Ministry of Justice, *Business Plan 2011-2015* (November 2010), p. 18; Joint Committee on Human Rights, *The Government's Human Rights Policy*, uncorrected evidence, November 16, 2010. There is a commitment to establish the new Commission of investigation in 2011, 'working with the Cabinet Office to agree its scope and timetable'.

¹⁵⁶ See Alice Donald, Philip Leach and Andrew Puddephatt, *Developing a Bill of Rights for the UK* (London: Equality and Human Rights Commission Research Report 51, 2010).

¹⁵⁷ Equality and Human Rights Commission, *Human Rights Inquiry: Report of the Equality and Human Rights Commission* (London: EHRC, 2008).

¹⁵⁸ Alice Donald, Philip Leach and Andrew Puddephatt, *Developing a Bill of Rights for the UK* (London: Equality and Human Rights Commission Research Report 51, 2010), vi.

¹⁵⁹ Alice Donald, Philip Leach and Andrew Puddephatt, *Developing a Bill of Rights for the UK* (London: Equality and Human Rights Commission Research Report 51, 2010), p. 7.

¹⁶⁰ 'The Bill of Rights process was part of an exercise in state-building with a transformative purpose and was politically controlled by a party with the mindset of a liberation movement', p. 10.

momentum behind the idea'.¹⁶¹ However, the report does list some key principles (based on the comparative research findings) that might guide a future process. It should be: non-regressive, transparent, independent, democratic, inclusive, deliberative and participative, educative, reciprocal, rooted in human rights, timed, symbolic, designed to do no harm, and respectful of the devolution settlements.¹⁶² The EHRC has promoted a set of key principles to inform its approach: any Bill of Rights should build on the HRA; there should be an inclusive process; in any process the Government should promote understanding of the HRA and the ECHR 'as well as countering any misconceptions'; the Commission should use the results of its human rights inquiry to inform its response.¹⁶³

The Northern Ireland Human Rights Commission and the Scottish Human Rights Commission issued a Joint Statement in support of 'retaining and building upon' the Human Rights Act 1998.

'Both Commissions agree that any process towards establishing a Bill of Rights and Responsibilities, or other similar statute, for the UK or any of its constituent parts, which seeks to repeal the UK Human Rights Act 1998 in part or in whole would be retrogressive in terms of the promotion and protection of human rights. Both Commissions agree that they will oppose any such process.'¹⁶⁴

As this statement suggests, debates on human rights in the UK are complicated by devolution, and the place of rights in these new arrangements. The UK is a plurinational state, and it is open to question whether the significance of this has been fully grasped in the ongoing conversations. This prompts the straightforward question of how the emerging Bill of Rights discussions will be located within these new configurations.

The specific devolution issues are addressed in a report by JUSTICE, which notes the relationship between the devolution statutes and the HRA, as well as the broader constitutional and political context.¹⁶⁵ Rather than simply erect barriers to a possible Bill of Rights, the report makes some of the legal and political challenges plain (including whether a legislative consent motion would be required), asking the familiar question 'whether any legislative action in this area would be worth the associated difficulties'.¹⁶⁶ The Northern Ireland experience is drawn on extensively to highlight the potential problems with a Bill of Rights process for the UK which is promoted in 'British/UK nationalist' terms.¹⁶⁷ The report

¹⁶¹ Alice Donald, Philip Leach and Andrew Puddephatt, *Developing a Bill of Rights for the UK* (London: Equality and Human Rights Commission Research Report 51, 2010), *Executive summary*, p. 4.

¹⁶² Alice Donald, Philip Leach and Andrew Puddephatt, *Developing a Bill of Rights for the UK* (London: Equality and Human Rights Commission Research Report 51, 2010), *Executive summary* pp. 6-7.

¹⁶³ See <http://www.equalityhumanrights.com>

¹⁶⁴ See <http://www.scottishhumanrights.com>. The three UK commissions (NIHRC, SHRC, and EHRC) have issued a joint statement calling on the UK Government to implement a 'separate Bill of Rights for Northern Ireland', 16 September 2010.

¹⁶⁵ JUSTICE, *Devolution and Human Rights* (London: JUSTICE, February 2010), para. 19: 'Politically, a "UK/British" bill of rights could be extremely divisive in the devolved jurisdictions, particularly in Scotland and Northern Ireland. A bill of rights must have a high degree of political and popular consensus, and this may be difficult to achieve in the devolved jurisdictions.' For one intriguing perspective on this report see Austen Morgan, 'No Devolving Human Rights' *The Guardian* February 24, 2010: 'The debate about a UK bill of rights and responsibilities – started by David Cameron in June 2006 – has become silly, a low point being reached with Justice's recent report on devolution and human rights.'

¹⁶⁶ JUSTICE, *Devolution and Human Rights* (London: JUSTICE, February 2010), p. 4, para. 20.

¹⁶⁷ In fact, the introduction notes that the report 'was inspired by feedback given to JUSTICE by a number of its Northern Irish members who highlighted the lack of engagement with the devolved jurisdictions'. JUSTICE, *Devolution and Human Rights* (London: JUSTICE, February 2010), p. 1, para. 6. Such concerns apply equally to Scotland and Wales. The report concludes: 'The HRA works, and at present the devolution framework has

therefore clarifies that the new constitutional landscape of the UK is complex - legally and politically - and underlines the fact that any 'liberal nationalist' British state-based project of constitutional renewal, which seeks to anchor itself in the discourse of rights, must proceed with legal and political understanding, caution and care.

Conclusion

The HRA continues to have a significant impact, and has been put to effective use in defence of human rights throughout the UK. At the time of writing, its repeal does not seem imminent, and the proposed creation of a Commission to investigate a new UK Bill of Rights that will expressly incorporate and build on *Convention rights* signals the level of political priority the question of immediate repeal has attracted. The Coalition Government has confirmed that progress will be made on the establishment of the new Commission in 2011, and the emerging theme is of better protection of rights and liberties in ways that are appropriate to the UK's particular national circumstances. This is a dialogue within the language of human rights and civil liberties, and is circling around ownership, interpretation and the scope of practical application.

There is little intrinsically misguided about attempting to locate and embed rights in a progressive state-based constitutional tradition, and supporters and sceptics have attempted to do precisely that. In fact, this is how national recognition of rights has often happened and, in traditional liberal theory, how the state is rationally reconstructed. However, notions of sub-state liberal nationalism have also re-emerged with considerable force in recent years, within the new context of a hard-won acceptance of constitutional complexities and the fact that many nationalisms may co-exist within the one state. There is increasing recognition that if states are to cohere into the future the reality of plurinational contexts must be fully understood and respected.¹⁶⁸ This is the context for much current thinking on how to frame state-based constitutionalism around the world, the origins of which often rest on processes of national democratic renewal, now sometimes captured in the language of 'constitutional patriotism'.¹⁶⁹

Any credible process of constitutional renewal within a plurinational state must proceed with caution and care. This is especially so if that process appears based on a re-assertion of the currently dominant 'nationalism' within the state, or a tale that is centrally integrative in intention, aspiration and tone. Complex and difficult questions of constitutional design will emerge. In the contested space of the UK, any major constitutional reform process will unearth specific and sharp challenges and dilemmas. Such a process may be defensible within a human rights-based analysis if in undertaking it the connection to an international and comparative practice of rights is fully acknowledged, and the *human* component of rights discourse is not swamped and corroded by narrowly nationalistic forces or unintended (or even intended) consequences of such a constitutional resurgence. A process of renewal and reform that opens windows to the world might even be a productive and sensible one. The risk in the emerging debate is that it often sounds more inward looking in nature, and at times is clothed in the language of national retreat and even withdrawal. Are we seeing the emergence of a new form of rights-based national protectionism as a substitute for the now derailed agenda of repeal of the HRA? If a new Bill of Rights process takes place, there is also a sound case for tying it to a broader and deeper constitutional conversation which takes

also been successful. Amendments to the HRA or legislating for a bill of rights would be dangerous and risky – to the protection of rights, to the constitution of the UK, and to the Union itself.'

¹⁶⁸ See Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford: Oxford University Press, 2004).

¹⁶⁹ J. Habermas, *Between Facts and Norms* (Cambridge: Polity Press, 1996); J. Habermas, *The Inclusion of the Other: Studies in Political Theory* (Cambridge MA: MIT Press, 1998).

seriously national diversity, autonomy rights and notions of self-determination within the UK.¹⁷⁰ Again, this sounds more like a process of writing a new constitution, than simply addressing the Bill of Rights chapter in it.

The universal aspect of human rights which says that ‘you cannot do that to a human person’ or ‘you can take that course of action if you can justify it in these prescribed terms’ will always remain in tension with governmental, societal and communal imperatives, whether those relate to refugees and asylum seekers, or prisoners (people will have different views about what ultimately anchors that non-reductive element of human rights). Rights will continue to have the qualities of ‘irritant’ and ‘obstacle’ for sound reasons, and will stand in the way of purely instrumentalist thinking (but do not stand in the way of a firm view of the sort of society that is desirable). What value would rights have if they did not? There are also productive, international and universalist tensions in play that defy closure - and of necessity must do – and national recognition of *human* rights is recognition of this fact too. What can be missed is that the HRA was presented and often defended in British liberal nationalist terms – but its practical outworking has not persuaded or satisfied those sceptical about its grounding and national origins. Successful as the HRA has been, it has failed to convince those who saw this element as vital. Part of this is connected to the fact that such instruments will of necessity highlight productive tensions, and will be used to challenge existing practice, but it is also connected to a sense of absence of ownership which has plagued the HRA since the beginning. The suggestion that a new instrument would have any greater success in becoming nationally grounded is open to question, particularly if this work is undertaken in isolation from a larger process of constitutional renewal and a firmer understanding of the diversity of nationalisms within the UK.

The UK is not the place it was. The debate about a British Bill of Rights should be viewed as suggestive of the need for a sustained long-term discussion of the current position of the UK and a new constitutional settlement for Britain,¹⁷¹ or even the UK,¹⁷² which reflects and respects ‘the state of the Union’. There is scant evidence that the ground has been prepared. The HRA remains securely in place for now, is well integrated within the legal systems of the UK, and has made a practical difference. It is not what everyone might wish for in an ideal Bill of Rights (examples are now there of what a more extensive instrument might resemble) but the present political context does not appear especially conducive to the enactment of a comprehensive and credible new British/UK Bill of Rights. The time for that

¹⁷⁰ See JUSTICE, *A British Bill of Rights: Informing the Debate* (London: JUSTICE, 2007), p. 115: ‘Creating a British bill of rights must be a common endeavour rather than an issue which becomes subject to political wrangling. It is in the interests of all parties to agree on a model which will endure as a feature of a new constitutional settlement in Britain.’ (emphasis added).

¹⁷¹ Complicated by the constitutional dynamics and relations between its main constituent parts, England, Scotland and Wales.

¹⁷² If it is a UK project this will embrace Northern Ireland and therefore be complicated by the competing and essentially state-based national projects that are in play as part of its ethno-national conflict (and the model adopted for negotiating that conflict). Substantial progress has already been made on the possible content of a Bill of Rights expressly for Northern Ireland (though cross-party agreement remains absent). The approach in Northern Ireland is additionally grounded in a process of legitimacy which includes a democratic mandate gained throughout Ireland, North and South. Irish nationalists and republicans see their future in a ‘new Ireland’ and know that continued presence in the UK rests solely on democratic agreement (a majority in favour in Northern Ireland for now). British loyalists and unionists see their future within the UK and know that this will continue as long as their view holds majority status within Northern Ireland. Constitutional renewal within the UK therefore looks markedly different to either side. A UK process that attempts to mask its own nationally integrative ambitions may have unintended and even risky practical consequences in such a jurisdiction. This is simply illustrative of how a UK-wide Bill of Rights process might look from a variety of ‘internal’ nationalist perspectives.

other Bill of Rights may come, and when it does the models to inform and shape such a document are there.

This article poses the ‘national question’ in a UK context. The Bill of Rights debate is increasingly being expected to do the work of a broader constitutional conversation about the UK and its future. That may be investing too much faith in the internal resources of human rights discourse, which will by necessity prefer personhood over citizenship as its principled basis. This personhood orientation will always disrupt the closure and confinement implicit in any exclusive categories.¹⁷³ The history of the UK and Europe in the twentieth century should tell us to trust this ethical instinct. It is a moral basis for human rights that resists processes of forgetting the suffering of others and knows the possible end result of insular and repressive national traditions. It is an ethical imperative that must, however, still engage with and practically inform the best that is possible within constitutional practices in national and transnational contexts.

There is therefore an intriguing irony in attempting to enlist human rights discourse to fill the gap where a more difficult constitutional conversation should really be. Rather than stumble into these problems of constitutional negotiation via a Bill of Rights, perhaps this ground should be better prepared and we should stop avoiding that other conversation. If a new Bill of Rights process does progress, expectations must be realistic about how it should be judged, and whether any such instrument could ever achieve a full and effective national grounding given the complexities, ambiguities and silences inherent in current British constitutional law and practice.

¹⁷³ See Linda Bosniak, ‘Persons and citizens in constitutional thought’ (2010) 8 *International Journal of Constitutional Law* 9.